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Real Property

Jack Titus

that the liquor dealer had been given a preference over other businessmen which could not be justified under the police power of the state. The court seemed unwilling to accord plaintiff the opportunity to prove that the privilege was not reasonably related to the protection of public health, safety, morals or general welfare.

If a state legislature purported to guarantee gross profits to an ordinary business, such legislation very likely would be invalidated as constituting a special privilege, as in *Noble v. Davis*. It seems hard to justify a different test when such guarantee is provided for a business which exists as a matter of mere privilege.

Jim Hambright.

REAL PROPERTY

Partition as Against Remainderman

Arkansas. In *McGee v. Hatcher*[1] the grantor conveyed a tract of land to his four daughters. Three of the daughters each took a fee simple title to an undivided one-fourth interest in the land, while the fourth daughter acquired only a life estate in the remaining one-fourth interest with remainder to her bodily heirs; or if she left no bodily heirs surviving her, the remainder was to go to her three sisters. When one of the owners of a fee simple interest obtained a partition decree, the Arkansas Supreme Court was faced for the first time with the question: may the owner of an undivided interest in fee compel partition in kind where one of the possessory interests is a life estate with contingent remainders limited thereafter to unidentified persons? If there may be partition, is it effective only for the duration of the life estate or is it binding on the remainder interests as well?

In holding that the partition decree was valid and binding as to the remainder interests, the court applied the following rule: when a possessory estate for life is owned by a joint tenant or by a tenant in common, and at least one undivided share in such land

[1] ____Ark.____, 230 S. W. 2d 41 (1950).

is owned in fee simple by another joint tenant or tenant in common, then such tenant has power to compel a partition of the ownership of the land so as to bind the future interests limited after the life estate, unless the creator of the life estate manifested an intent by the terms of its creation, that there should be no such power.

Arkansas thus seems to align itself with the majority of American jurisdictions which hold that one who has an estate for life, or in fee simple, in possession in an undivided share can ordinarily maintain a partition proceeding as against all the others interested in the property, including remaindermen as well as life tenants.[2]

WORDS OF LIMITATION; RULE AGAINST PERPETUITIES

Arkansas. In *Fletcher v. Ferrill*[3] Fletcher conveyed a tract of land to a Masonic Lodge, reserving a life estate in himself. After providing that the Lodge should use the land exclusively for the benefit of a specified orphans' home, the deed read, ". . . and when it ceases to be so used, or when said home and school shall be moved from Batesville, Arkansas, said property shall revert to the heirs of the said J. W. Fletcher." After Fletcher's death, and after the Lodge ceased using the land as directed, Fletcher's heirs claimed title under the deed.

The principal question involved in the case was whether the word "heirs" in the deed created (a) a possibility of reverter in Fletcher himself, so that the land would now go to his widow as his residuary devisee, or (b) an executory limitation to Fletcher's heirs which would become a possessory interest upon the termination of the determinable fee. The court ruled that the words in the deed were words of limitation and not of purchase, which created, not an executory interest in the heirs, but a possibility of reverter. The court then held, following the majority American rule, that a possibility of reverter is an interest which may pass by will; hence the grantor's residuary devisee prevailed.[4]

[2] 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) § 476.
[3] .....Ark....., 227 S. W. 2d 448 (1950).
[4] 2 RESTATEMENT, PROPERTY (1936) § 164, Comment c, and § 165, Comments a and f.

The majority of the court further ruled that even if the word "heirs" was used in the deed as a word of purchase, the land would still go to the residuary devisee because of the Rule against Perpetuities. Under such an interpretation the heirs of the grantor would have an executory interest in the property throughout the existence of the determinable fee, and, since such interest might not vest within the period allowed by the Rule, it was declared void. This theory was supported in a concurring opinion, which declared the word "heirs" in the deed to be a word of purchase, resulting in the creation of an executory interest in the heirs which was void by the application of the Rule against Perpetuities.

Adverse Possession

Texas. In *Condra v. Grogan Mfg. Co.*[5] the widow of the intestate continued to live with the plaintiffs, a daughter's children, on a part of the land owned by her and her husband. Immediately after the widow's death plaintiffs orally agreed with some of the widow's children that they (plaintiffs) should jointly own the part of the land on which they had been living, and that the widow's children should jointly own the remainder of the land. Following this agreement in 1921, plaintiffs lived on and openly used the tract in question until 1940. In 1927 the other four parties to the partition agreement each conveyed to the defendant an undivided one-fifth interest in the entire tract.

The Texas Supreme Court, with some modifications, sustained the plaintiff's claim, by adverse possession, to the tract they took under the partition agreement. The court ruled that their possession was adverse as to the other parties to the agreement, and that conveyance by the latter of their former interests in the entire parcel of land did not affect the operation of the statute of limitations, although the purchaser had no knowledge of the oral partition agreement.

The majority of the court ruled that although the partition agreement was not binding upon one of the parties who was incompetent, the grantee (who acquired the incompetent's interest

[5] .....Tex....., 233 S. W. 2d 565 (1950).

by guardian's deed) was charged with knowledge of the plaintiff's claim of absolute ownership, as vendee of the competent parties, and no new notice was necessary. However, as to the interest of a son's widow, who was not a party to the partition agreement and who had been out of contact with the others, the court held that the agreement was ineffective, and that her interest remained unaffected by plaintiffs' possession because their acts in the assertion of their adverse claim were not of such unequivocal notoriety as to charge her with notice.

The dissenting justices, in denying that the plaintiffs acquired title by adverse possession to the share formerly owned by the incompetent, stated that it is unjust to hold that the vendee's innocent purchase of an undivided interest, against which a limitation claim happens to be maturing, of itself charges him with knowledge that there is an adverse claim to every other undivided interest in the same land, even though the statute has never started to run against the latter.

The rule that prevails generally throughout the United States is that the possession of land is evidence of title and is sufficient to put a subsequent purchaser on inquiry. Every person dealing with land is bound to take notice of an actual, open and exclusive possession.[6] Inasmuch as plaintiff's possession and use was not merely of an undivided interest in the tract but was occupation under a claim of absolute ownership, the holding by the majority that there was no necessity for new notice to the grantee when it acquired each undivided interest of the entire parcel of land seems entirely justified.

EASEMENT BY PRESCRIPTION

Texas. In *Othen v. Rosier*[7] plaintiff's land was so situated that he had to cross someone's land to get to a highway. For twenty years he had traveled over a lane across the defendant's land, and when defendant constructed a levee to prevent surface water drainage, plaintiff sought enforcement of an easement and destruction of the levee because the impounded water inundated the lane. The

[6] 8 THOMPSON, REAL PROPERTY (Perm. Ed. 1940) § 4513.

[7] 148 Tex. 485, 226 S. W. 2d 622 (1950).

evidence introduced showed that both plaintiff and defendant derived their title from a common source, and that the lane was used by the defendant, as well as plaintiff, to haul wood, to permit livestock to get to and from a pasture, and for general farm purposes.

The Texas Supreme Court, in denying the existence of an easement by necessity, said that such an easement can arise only from an implied grant or reservation. The fact that the claimant's land is completely surrounded by the land of another does not, of itself, give the former a way of necessity over the land of the latter, where there is no privity of ownership. The facts here showed that at the time the original owner conveyed the tract over which the easement was sought to defendant's predecessor, he retained the land now owned by the plaintiff and an adjoining tract over which he could reach the highway. Consequently, there could be no implied reservation of an easement because there was no necessity for one at the time of the severance of the two estates.

The plaintiff's claim of an easement by prescription was likewise defeated, the court basing its holding on the rule requiring as an important essential to the acquisition of a prescriptive right, that the use of the easement be adverse.[8] There is no doubt that this rule prevails generally throughout the United States, but there is a very definite split of authority as to the interpretation of the words "adverse use." The user by another of a way or space laid out or left by the landowner, concurrently with its user by the latter, has occasionally been regarded as being presumably by permission of the landowner.[9] But whether such user is permissive would seem properly to be determinable with reference to all the circumstances of the case, more particularly the character and location of the way and the place of passage. The fact that the owner of the land also passes in the same place would not seem in itself sufficient to show that the user is permissive.[10] The result reached in the *Othen* case seems proper, but the mere fact that the defendant used the lane also would not appear to be, of itself,

[8] Weber v. Chaney, 5 S. W. 2d 213 (Tex. Civ. App. 1928) *er. ref.*; Callan v. Walters, 190 S. W. 829 (Tex. Civ. App. 1916).

[9] Sassman v. Collins, 115 S. W. 337 (Tex. Civ. App. 1908) *er. ref.*

[10] 3 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1196a.

decisive. An accumulation of factors—defendant's maintenance of the lane for purposes of travel; defendant's knowledge that the lane's location provided the plaintiff with an extremely convenient means of passage between his land and the highway; the circumstance that the defendant, though he knew the plaintiff was using the lane, did not attempt to exercise his right to prevent such use; the maintenance of a gate and fences enclosing the lane by defendant—all considered together, seem to justify the result that plaintiff's user was pursuant to license only.

Melvin R. Stidham.

UNDERGROUND WATER—THE DOCTRINE OF APPROPRIATION

New Mexico. The State of New Mexico brought suits to enjoin three defendants from using water drawn through wells on their land from the Roswell Artesian Basin to irrigate the same land.[11] The suits were brought pursuant to an act of the New Mexico Legislature which declared the water in the basin to be public property, subject to appropriation for beneficial use, after application for use and approval thereof by the State Engineer.[12] The principal issue raised was whether the act was violative of the Fourteenth Amendment to the Constitution of the United States, in that it authorized the State to deprive its citizens of property without due process of law. Defendants asserted that the water under their land belonged to them by virtue of the common law or under the doctrine of correlative rights.

The question was raised in an earlier case in New Mexico, *Yeo v. Tweedy*,[13] where it was held that the title to the water belonged to the public, and that such had always been the law in the state, by virtue of custom and necessity. The decision explained that although the State had adopted the common law, it was adopted only in so far as it satisfied the needs of the area, and that for this reason the doctrine of appropriation of water to beneficial use applied instead of common law doctrine.

[11] State *ex rel.* Bliss v. Dority, ... N. M. ....., 225 P. 2d 1007 (1950).

[12] N. M. STAT. 1941 ANN. § 77-1101 *et seq.*

[13] 34 N. M. 611, 286 Pac. 970 (1930).

In the instant case the decision was placed upon an entirely different ground. The court stated that the case of *California-Oregon Power Co. v. Beaver Portland Cement Co.*[14] was applicable, wherein the Supreme Court of the United States held that the federal Desert Land Act[15] severed title to all non-navigable waters on land granted under the act and vested title in the state or territory for the benefit of the public, to be disposed of under the laws of the respective states or territories. The conclusion reached in the Supreme Court case was that the non-navigable waters are subject to the plenary control of the state or territory.

Since that case did not involve underground water, it was necessary for the New Mexico court in the instant case to construe the Desert Land Act to determine ownership of the underground water. The applicable portion of the act reads as follows: ". . . the water of all lakes, rivers, *and other sources of water supply* upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public. . . ." (Italics added.) The court concluded that by these words Congress contemplated all water which might be used for irrigation, which would include underground sources of water.

Other holdings by the court on issues raised by the defendants involving the validity and construction of the New Mexico act were: court adjudication of the boundaries of the underground reservoirs is not necessary for jurisdiction of the State Engineer to attach; no right to the use of the water may be obtained by user, the statutory method being exclusive; and the State Engineer's power to find boundaries of reservoirs and to pass upon applications for water is not an unconstitutional delegation of power.

While it appears that under the reasoning of the earlier decision in *Yeo v. Tweedy* the court might have later found some vested rights in underground water incident to land ownership, it seems clear after the decision in this case that all rights in water which may be used for irrigational purposes are subject to the declarations of the New Mexico Legislature.

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[14] 295 U. S. 142 (1935).

[15] 19 STAT. 377 (1877), 43 U. S. C. 1946 ed. § 321 *et seq.*

REINJECTION OF SALT WATER—RIGHTS OF ADJOINING LANDOWNERS

Oklahoma. In the case of *West Edmond Salt Water Disposal Association v. Rosecrans*[16] the Supreme Court of Oklahoma held that the Disposal Association might not be enjoined and was not liable in damages to plaintiff, an adjoining landowner, for the injection of salt water into a stratum which was already saturated with salt water, where the water injected migrated through the stratum and under the land of plaintiff but caused no actual damage to the land or rights of plaintiff.

Defendant was an association of oil companies which were producing in the West Edmond Field. They secured permission from the owner of a forty-acre tract to use an abandoned well on his property as a means of injecting salt water into a sub-surface stratum known to contain nothing but salt water. In this suit plaintiff, who owned the land immediately east of the land being used by defendant, sought ejectment of defendant from plantiff's land, an injunction to prohibit a continuing trespass, judgment for mesne profits accruing to defendant, damages for injury to his land, and exemplary damages. Plaintiff failed to offer any evidence of actual damage to his land, thus leaving three causes of action and the request for exemplary damages. Defendant admitted liability for actual damage to plaintiff's land, if any had resulted, but denied all other liability.

The court interpreted the plantiff's claims as being based on the assumption that the water injected into the stratum remained the property of defendant after it migrated from the bounds of the tract on which it was injected, and that therefore defendant had taken the land of plaintiff and was using it as a storage reservoir for its water. On this assumption plaintiff contended that he was entitled to ejectment and judgment for the profits accruing to defendant from the use of the land.

The court held that the defendant was not storing water on the land of plaintiff, because title to the water was lost when it left the bounds of the tract used by defendant. The court concluded

[16] .....Okla....., 226 P. 2d 965 (1950), *app. dism'd*, 340 U. S. 924 (1951).

that since the act of defendant was lawful and did not damage plaintiff's property or take property or deprive him of any rights in connection therewith, plaintiff could not maintain any of the causes of action asserted.

This decision is based on solid authority since it turns upon the majority view as to ownership of percolating water, which has been stated as follows:

> "When percolating waters escape and go into land, or come into another's control, or reach a natural channel, whatever rights the owner of the land from which they passed may have had in them, because in his land, are ordinarily lost."[17]

The result is consistent with the needs of the oil industry, but does not deprive the adjacent landowner of any remedy which he might have for actual damages, since the court examined and clearly distinguished the line of cases in which such acts caused actual damage.

JUDICIAL SALE OF LAND AFFECTED BY A FUTURE INTEREST

Oklahoma. Whitten v. Whitten[18] was an action to quiet title to land, and in the alternative for partition. The grantor of the tract conveyed a life estate to plaintiff with remainder to the heirs of her body. At a later date grantor conveyed her remaining interest to the life tenant. The court held, reversing the trial court, that the first deed created a contingent remainder in the children of the life tenant (plaintiff), and that the second deed conveyed the reversion to the life tenant, but did not affect the contingent remainder.[19] Thereafter the court stated its views on the power to order judicial sale of the entire interest in a tract of land where title, as here, is subject to contingent interests. Although this point was apparently not before the court, it was stated as a guide to the trial court on remand for a new trial, since in her petition plaintiff sought partition in the alternative in the event that the court found that she did not have the full fee simple interest.

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[17] 3 TIFFANY, LAW OF REAL PROPERTY (3d ed. 1939) § 746.

[18] .....Okla....., 219 P. 2d 228 (1950).

[19] 60 OKLA. STAT. ANN. (Perm. Ed.) § 41.

After stating that there may be no partition in kind between a life tenant and an owner of a remainder interest, the court laid down the requisites for judicial sale of the land. The conclusion reached may be best stated by the following quotation from the opinion:

> "It appearing from the record that the interests of those who take by way of remainder, the unborn as well as those living, are properly represented; and it further appearing that the requisite accord between the parties appears from the record, it follows that a judgment for the sale of the entire ownership in the land in each case for the purpose of reinvestment, in whole or in part, would be authorized and proper upon showing being made to the satisfaction of the court that such sale would be beneficial."[20]

In another part of the opinion the court stated that the proceeds of the sale must be treated in the same manner as the land would have been, with respect to the various interests therein.

By the majority view, the requisites for judicial sale of land affecting future interests are: the sale must be necessary for the preservation of some interest in the property, and probably must be beneficial to the interest of unborn persons or minors; all ascertainable living persons must consent to the sale; the court must have jurisdiction of all possible parties; and proceeds from the sale must be substituted for the land.[21] The opinion of the court is in harmony with this view except where it requires only that the sale must be beneficial, without any requirement that there be a necessity for the sale. It may be argued that the requirement only that the sale be beneficial to all interests is preferable, since as a practical matter the failure to make a beneficial sale will prevent the parties from deriving the maximum benefit from their estate, but such an action would seem to be a substantial encroachment on property rights of the unascertained persons.

Jack Titus.

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[20] 219 P. 2d at 233.

[21] 3 SIMES, THE LAW OF FUTURE INTERESTS (1936) §§ 792, 793.